Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1056

In The

Supreme Court of the United States

October Term, 1987

WALTER K. PENDLETON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

DENNIS R. DUNN
Assistant
Attorney General
Counsel of Record
for the Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

DENNIS R. DUNN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to review Petitioner's constitutional challenge to O.C.G.A. § 40-6-392(b)(4) and a jury charge related thereto where this issue was not properly raised, presented or decided by the courts below?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASON FOR NOT GRANTING THE WRIT 3

A. THIS COURT SHOULD DECLINE TO GRANT A WRIT OF CERTIORARI BECAUSE THE ISSUE PRESENTED IN THIS CASE WAS NOT RAISED, PROPERLY PRESENTED OR DECIDED BY THE GEORGIA COURTS 3

CONCLUSION 8

TABLE OF AUTHORITIES

Pages

CASES:

Beck v. Washington, 369 U.S. 541 (1962) 6

Cardinale v. Louisiana, 394 U.S. 437 (1969)..... 6

Herndon v. Georgia, 295 U.S. 441 (1935) 6

Lester v. State, 253 Ga. 235, 320 S.E.2d 142 (1984) 6

Pendleton v. State, 184 Ga. App. 358, ___ S.E.2d ___ (1987) 3, 5

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 6

Sandstrom v. Montana, 442 U.S. 510 (1979).....3, 5

Stembridge v. Georgia, 343 U.S. 541 (1952) 6

Turrentine v. State, 176 Ga. App. 145, 335 S.E.2d 630 (1985)..... 7

STATUTES:

O.C.G.A. § 40-6-392(b)(4).....3

No. 87-1056

In The

Supreme Court of the United States

October Term, 1987

WALTER K. PENDLETON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On January 8, 1986, at approximately 2:11 a.m., Petitioner Walter Pendleton was stopped and cited by officer Frank Baker of the Cobb County, Georgia, "D.U.I." task force for the offenses of driving a motor vehicle while under the influence of alcohol, driving with an unlawful blood-alcohol level and failure to

maintain a proper lane while driving. (R. 3-6, 11-12; T. 50, 52-55, 57-58). Despite the strong odor of alcohol exuding from the Petitioner's vehicle, the Petitioner had denied drinking any alcoholic beverage at all. (T. 58-60).

Officer Baker administered a series of field sobriety tests, all of which the Petitioner "failed" by giving indications of being under the influence of alcohol. (T. 59-61, 64-67, 68-70, 87-89). Included as one of those tests was an "alcosensor" breath analysis test, which indicated a positive result for alcohol. (T. 66-70, 81-83). After agreeing to a chemical analysis of his blood-alcohol content pursuant to the Georgia implied consent statute (T. 71, 75-79), the intoxication test was administered and showed a blood-alcohol content of .20 grams percent, an amount over the Georgia legal limit for driving. (T. 138-40, 143, 145-46).

The Petitioner, through his defense witness, claimed that he had swerved from his driving lane in order to avoid a manhole cover or a pot hole in the road. (T. 150-52, 157-58). The Petitioner's witness admitted that Petitioner had been drinking at a nearby nightclub prior to his driving of the vehicle (T. 169-70).

The trial jury convicted the Petitioner of all three offenses (R. 25; T. 29[illegible] and the trial court recognized that the Petitioner's convictions for driving under the influence and driving with an unlawful blood-alcohol level merged as a matter of Georgia law. (T. 297). The Petitioner was thereafter sentenced to twelve months imprisonment, twelve months consecutive probation and a fine of $1,000.00 for his two convictions. (R. 28; T. 309-11).

On September 8, 1987, the Court of Appeals of Georgia affirmed the Petitioner's convictions and sentences. *Pendleton v. State,* 184 Ga. App. 358, ___ S.E.2d ___ (1987). Rehearing was denied by that court on September 29, 1987, and the Supreme Court of Georgia denied the Petitioner a writ of certiorari on October 28, 1987.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DECLINE TO GRANT A WRIT OF CERTIORARI BECAUSE THE ISSUE PRESENTED IN THIS CASE WAS NOT RAISED, PROPERLY PRESENTED OR DECIDED BY THE GEORGIA COURTS.

Petitioner Walter K. Pendleton alleges in this application that O.C.G.A. § 40-6-392(b)(4), the Georgia statute regarding driving under the influence and the level of blood-alcohol content, is unconstitutionally burden-shifting under the guidelines of the Fourteenth Amendment and this Court's decision in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Respondent submits that this issue was not properly raised or presented to the Court of Appeals of Georgia and that the Court of

Appeals of Georgia did not address this issue in its decision regarding the Petitioner's direct appeal. As such, this issue is improperly presented to this Court for review anad presents no basis for the granting of a writ of certiorari.

On direct appeal the Petitioner raised as his eighth enumeration of error a challenge to a portion of the trial court's charge which, in accordance with O.C.G.A. § 40-6-392(b)(4), stated that if the jury found that a driver had a blood-alcohol content of .12 grams percent, that established a per se violation of Georgia law. (*See* T. 281). The Petitioner maintained that this charge, along with two other portions of the trial court's charge, was:

> [I]mproper as they were confusing to the jurors; furthermore, these charges attempted to discount or explain the evidence presented to the jury by the [Petitioner]. As a result, the charges impermissibly prejudiced the [Petitioner] and presents the issue of whether the conviction entered below is a valid conviction of a court of this state.

(Petitioner's brief on direct appeal, p.4.)

The Petitioner also argued to the Court of Appeals of Georgia that the charge conflicted with the Georgia constitution and with the Georgia statutory provisions providing for the jury to be both the judge of the facts and law presented at trial. *Id.* at 21. The Petitioner argued that the charge was inconsistent and conflicting, that the charge was not sufficiently clear to avoid confusing the jury and therefore did not meet the standard for proper jury charges. *Id.*

The Petitioner did not argue to the Court of Appeals of Georgia that this particular portion of the

charge was unconstitutionally burden-shifting under the guidelines of either the Fourteenth Amendment or this Court's decision in *Sandstrom v. Montana,* 442 U.S. 510 (1979).

Only in conjunction with his ninth enumeration of error, a challenge to the trial court's charge that "impaired driving ability is not a factor necessary to constitute the crime alleged in count two (of the indictment)," did the Petitioner raise a claim of a burden-shifting charge. *Id.* at 21. Regarding that particular challenge, the Petitioner argued that the charge instructed the jury to disregard other evidence of the Petitioner's driving ability and claimed that that portion of the charge permitted the jury to "presume the [Petitioner's] blood-alcohol level if the State was unable to establish this fact." *Id.* However, this portion of the Petitioner's brief also raised no constitutional challenge to O.C.G.A. § 40-6-392(b)(4).

Even in the Petitioner's motion for rehearing before the Court of Appeals of Georgia, the Petitioner still challenged only the trial court's charge to the jury and not any attack upon the statute, as apparently presented in the instant petition.

In addressing these allegations on direct appeal, the Court of Appeals of Georgia summarized the Petitioner's challenges to the trial court's charge, none of which included a claim that the charge itself was impermissibly burden-shifting. *See Pendleton v. State,* 184 Ga. App. at 359(1). As such, the Court of Appeals of Georgia was not presented with the same issue raised in the instant petition for writ of certiorari and has accordingly not presented any ruling based upon this issue.

As this Court has recognized, the Court will not decide federal constitutional issues raised for the first time on a petition for writ of certiorari seeking review of state court decisions. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). Additionally, where there is a strong possibility, in light of Georgia law, that the state court decision might have rested on a nonfederal ground, this Court has found that there is no jurisdiction for the granting of a writ of certiorari. *Stembridge v. Georgia,* 343 U.S. 541, 543 (1952). *See also Beck v. Washington,* 369 U.S. 541, 550-54 (1962). Finally, even if a claim is raised in a motion for rehearing before a state's highest court, that issue is raised too late for consideration by this Court absent a showing that the state court then addressed the newly raised claim on its merits. *See Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935).

Respondent submits that the question presented in the instant petition for a writ of certiorari was not properly raised either in the Petitioner's brief or his motion for rehearing before the Court of Appeals of Georgia, and as such presents this Court with an issue raised for the first time by this Petitioner. As such, Respondent urges this Court to reject the Petitioner's requests for review in this case.

Finally, assuming *arguendo* that this issue could have been raised and addressed by the Court of Appeals of Georgia, both the Supreme Court of Georgia and the Court of Appeals of Georgia have previously and properly rejected this identical claim of a constitutional violation. *Lester v. State,* 253 Ga. 235, 237-38(2), 320

S.E.2d 142 (1984); *Turrentine v. State,* 176 Ga. App. 145, 147-48(2), 335 S.E.2d 630 (1985). As such, where the issue raised in the instant case was properly presented to the Georgia courts in those other cases, these allegations were properly determined to be without merit.

Accordingly, for all of the above and foregoing reasons, Respondent asserts that the Petitioner has failed to present any substantive issue law which would warrant review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with applicable decisions of this Court.

Respectfully submitted,

DENNIS R. DUNN
Counsel of Record
for the Respondent

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

Please serve:

DENNIS R. DUNN
132 State Judicial Bldg.
40 Capitol Square S. W.
Atlanta, Georgia 30334
(404) 656-3499